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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of 1998 Biennial Regulatory Review - Review of International Common Carrier Regulations	IB Docket No. 98-118

COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA")[1] respectfully submits these comments in response to the Notice of Proposed Rulemaking[2] issued in the above-referenced docket. PCIA requests that the Commission exercise its authority pursuant to Section 10 of the Communications Act to forbear from applying Section 214 requirements to Commercial Mobile

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1 PCIA is the international trade association representing the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligible and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

2 *1998 Biennial Regulatory Review - Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 98-149 (July 14, 1998) (Notice of Proposed Rulemaking) [hereinafter "*NPRM*"].

Radio Service ("CMRS") operators providing telecommunications service to unaffiliated international points and CMRS providers reselling the long distance services of unaffiliated U.S. carries to affiliated markets.[3]

I. INTRODUCTION AND SUMMARY

As PCIA will demonstrate herein, the Commission must forbear from applying Section 214 authorization requirements to CMRS operators providing telecommunications service to unaffiliated international points under the three-pronged test of Section 10. First, enforcement of Section 214 with respect to international telecommunications services on unaffiliated routes is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Second, enforcement is not necessary to protect consumers. Third, elimination of the specified international Section 214 requirements will serve the public interest.

Further, the Commission should forbear from Section 214 requirements for CMRS providers reselling the long distance services of unaffiliated carriers to affiliated points because these providers do not pose anticompetitive concerns. CMRS providers operating as switched service resellers use the underlying facilities of unaffiliated U.S. carriers and, thus, do not negotiate the terms and conditions of access to the destination market with their foreign affiliate.

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[3] PCIA's comments focus on forbearance from or streamlining of the Commission's Section 214 requirements. PCIA also endorses the proposal to permit authorized carriers to complete *pro forma* assignments and transfers of control of international Section 214 authorizations without prior Commission approval, pursuant to the Commission's exercise of forbearance. *See NPRM*, ¶¶ 12-21. Adoption of the *NPRM's* proposal would be consistent with relief recently granted for *pro forma* transactions involving authorizations administered by the Wireless Telecommunications Bureau. *See Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, 13 FCC Rcd 6293 (1998) (Memorandum Opinion and Order).

Moreover, because these providers lack control over the underlying facilities, they are incapable of driving competitors from the market or preventing subsequent entry. Hence, forbearance equally is warranted for these providers.

If the Commission is not satisfied that forbearance from Section 214 requirements is warranted, PCIA urges the Commission, in the alternative, to adopt its proposed blanket Section 214 authorization for CMRS operators providing international services to unaffiliated points and CMRS providers reselling the long distance services of unaffiliated carriers to affiliated points. As a last resort, if neither forbearance nor a blanket authorization is approved by the Commission, PCIA requests that, at a minimum, the Commission shorten the initial application review period to five business days and the comment period to five days.

II. THE COMMISSION SHOULD FORBEAR FROM SECTION 214 REQUIREMENTS FOR CMRS OPERATORS PROVIDING INTERNATIONAL SERVICES TO UNAFFILIATED MARKETS.

Under Section 10(a) of the Act, the Commission must forbear from applying any provision of the Act if the Commission determines that: (1) enforcement is not necessary to ensure that rates and practices are just and reasonable and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[4] In analyzing whether forbearance is in the public interest, Section 10(b) requires that the Commission consider whether forbearance will "promote competitive market conditions,

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[4] 47 U.S.C. § 160(a)(1-3).

including the extent to which such forbearance will enhance competition among providers of telecommunications services."[5]

Forbearance from Section 214 requirements clearly is warranted for CMRS providers serving unaffiliated markets. As PCIA will demonstrate below, robust competition in the international marketplace will be an effective watchman to ensure that rates and practices are just and not unreasonably discriminatory. Further, forbearance will eliminate unnecessary delays and administrative burdens, thereby hastening the introduction of innovative services and additional competition into the international marketplace.

A. Enforcement of the International Section 214 Authorization Requirements for CMRS Operators Serving Unaffiliated Markets Is Unnecessary To Ensure that Rates and Practices Are Just, Reasonable, and Not Unreasonably Discriminatory.

Competition in the international marketplace will ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. CMRS operators, as new entrants into the international marketplace, are devoid of market share and thus lack the ability to engage in unjust or unreasonable practices. Further, these providers lack any incentive to engage in such conduct because anticompetitive activities would pose too significant a risk for these providers whose very survival in the international market is dependent on their ability to attract and retain consumers.

The Commission seeks comment on whether forbearance is more appropriate for CMRS providers than for other carriers.[6] Forbearance for CMRS providers operating on unaffiliated

[5] 47 U.S.C. § 160(b).

routes is not only appropriate but required under Section 10. Competition in the international marketplace for wireless services is more robust than for other telecommunications services. Indeed, the Commission recently recognized this fact. In its discussion considering PCIA's petition for forbearance from Section 214 international requirements,[7] the Commission acknowledged that "domestic wireless markets are becoming increasingly competitive."[8] More specifically, in its *Third Annual CMRS Competition Report*,[9] the Commission described the level of competition in CMRS markets: 87 percent of the nation's POPs have three or more operators providing mobile wireless service and over 68 percent of the nation's POPs have four to six providers.[10] Importantly, five studies found a significant downward trend in pricing in mobile telephony as PCS providers enter markets.[11] Finally, CMRS operators vigorously compete against one another in their advertisements on all available media, including web pages.[12] This

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6 *NPRM*, ¶ 11.

7 *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, FCC 98-134, ¶¶ 45-54 (July 2, 1998) [hereinafter "*Forbearance Order*"].

8 *Id.*, ¶ 51.

9 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* FCC 98-91 (June 11, 1998) (*Third Report*).

10 *Id.* at 19.

11 *Id.* at 19-20.

12 *See* Sprint Spectrum: Feature and Benefits (visited Aug. 12, 1998) <http://www.sprintspectrum-apc.com/features.html> (stating, "[i]ntegrated features make Sprint Spectrum superior to other wireless services"); and Sprint Spectrum Ranks Highest in Customer Satisfaction among Wireless Carriers in Washington and Baltimore (visited Aug. 12, 1998) <http://www.sprintspectrum-apc.com/cus_satis.html> (citing J.D. Power and Associates study

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description stands in marked contrast to the wireline local exchange markets, where the Commission has denied all applications for local entry into long-distance because in-region Bell operating companies have failed to demonstrate their markets are open to competition.[13]

The international telecommunications markets are similarly configured. As the Commission also recently described in its consideration of PCIA's petition for forbearance from Section 214 international requirements, even with the conclusion of the World Trade Organization ("WTO") Basic Telecommunications Agreement, "many foreign markets will continue to be served by monopoly or dominant providers of services or facilities that are necessary for the provision of U.S. international services."[14] Most, if not all, CMRS providers will operate as resellers of international long distance services. As new entrants into an increasingly competitive market, CMRS providers will have to compete vigorously against each other[15] and the incumbent carriers to survive.[16] Thus, CMRS providers will do their best to

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finding that "[l]ess than two years after launching, Sprint Spectrum has earned the "Highest Overall Customer Satisfaction" ranking among wireless users in the Washington-Baltimore area"').

13 *See Application by BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 6245 (Feb. 4, 1998); *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd 539 (Dec. 24, 1997); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 (Aug. 19, 1997); and *Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, 12 FCC Rcd 8685 (June 26, 1997).

14 *Forbearance Order*, ¶ 49.

15 *See Trends in the International Telecommunications Industry*, Industry Analysis
(Continued...)

obtain services from underlying facilities-based carriers at the lowest prices possible so that they can resell at competitive rates and build a client base. Accordingly, the competitive conditions in the marketplace more than adequately ensure that CMRS operators' rates are just and reasonable, thereby alleviating any need for regulatory enforcement to ensure rates and practices are just and reasonable and not unreasonably discriminatory.

B. Enforcement of the International Section 214 Authorization Requirements Is Unnecessary To Protect Consumers.

International Section 214 requirements are unnecessary to protect consumers of CMRS offerings on unaffiliated international routes. As new entrants into the marketplace, CMRS providers have the daunting task of luring consumers away from the more recognized and more established incumbent carriers. Thus, they have an economic incentive to maximize the demand for their service offerings to build market share. This necessarily will entail the development and deployment of new products, services, and packages. Unreasonable rates or practices would deter consumers, thereby decreasing revenues for CMRS operators. The Commission can be assured that CMRS operators will devote significant resources to establishing a customer base, which means these providers will find innovative ways to better serve consumers. Thus, continued imposition of international Section 214 requirements on CMRS operators providing service to unaffiliated international locations is unnecessary to assure that consumer interests are safeguarded.

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Division, Common Carrier Bureau, 57, 61 (Aug. 1998) (stating that new carriers are vying for market share in the international marketplace).

[16] *Id.* at 50.

C. Forbearance from Applying the International Section 214 Authorization Requirements Is Consistent with the Public Interest.

Forbearance from Section 214 authorization requirements for CMRS providers serving unaffiliated international points would further the public interest. It would eliminate unnecessary delays in commencing service on international routes and processing burdens on Commission staff.[17] Further, it will expedite the entry of numerous resellers into the market and thereby "promote competitive market conditions."[18] As it stands, CMRS operators seeking to provide service to unaffiliated points have to wait more than 35 days[19] before they can begin offering international services. Such delay is unnecessary because these providers, as new entrants devoid of market share, do not have the ability or incentive to engage in anticompetitive behavior. These providers have only one goal: to survive in the marketplace. This can only be accomplished by acting pro-competitively. Thus, competition in the international marketplace for CMRS services will ensure that the public interest is served.

The Commission previously declined to forbear from Section 214 authorization requirements for CMRS operators because it was concerned that a CMRS carrier's foreign affiliate[20] could leverage its market power on an affiliated route to the detriment of U.S.

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17 *See NPRM*, ¶ 8.

18 47 U.S.C. § 160(b).

19 47 C.F.R. § 63.12. These carriers generally have to wait one to two weeks for their application to be placed on public notice, plus at least 35 days after public notice, assuming their applications are not contested, before they can commence service.

20 It is PCIA's understanding that the Commission's concern with foreign affiliations is limited to U.S. carriers that have an affiliation with a foreign carrier that has international transport facilities, inter-city facilities or local access facilities (generally referred to as "wireline" carriers). Foreign carriers that do not possess wireline facilities do not raise

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consumers and competing U.S. carriers.[21] This concern is not triggered to the extent PCIA's request for forbearance is limited to unaffiliated routes. Further, the Commission's conclusion that it "must be able to condition or revoke an authorization to prevent anticompetitive effects" is unwarranted. As the Commission correctly notes, "there now are few if any grounds that would warrant denial or conditioning of an authorization to serve" an unaffiliated route.[22] Indeed, the agency has acknowledged that most streamlined applications are unopposed and those that are involve concerns about foreign affiliations.[23] CMRS operators serving unaffiliated points simply do not raise any anticompetitive threat. Therefore, continued application of Section 214 requirements for the defined class of providers is pointless.

Moreover, to the extent that the Commission wishes to monitor anticompetitive behavior by CMRS operators, such conduct could be detected via other regulatory safeguards. Most importantly, entities suspecting that CMRS operators are engaging in unjust and unreasonable practices can file a complaint with the Commission pursuant to Section 208 of the Communications Act.[24] As Commissioner Powell recently noted, in a competitive market, the Commission "should look to performance measurement and vigorous enforcement, more often

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competitive concerns for the Commission.

21 *Forbearance Order*, ¶ 51.

22 *NPRM*, ¶ 7.

23 *Id.*

24 47 U.S.C. § 208.

than prospective regulation, as a means to protect the public against certain identifiable harms."[25] In addition, if the Commission at some point in the future determines that forbearance from Section 214 requirements is no longer in the public interest, it may reestablish Section 214 regulatory requirements for these providers.

The reality is that continued imposition of Section 214 requirements for CMRS operators providing international services to unaffiliated points serves no purpose. Instead, it hampers competition, delays the introduction of new services into the industry, and continues to place unnecessary administrative burdens on Commission staff. The Commission has repeatedly expressed its commitment to forbear from regulations that do not further the public interest. The time is now at hand for the Commission to honor its commitment.

III. THE COMMISSION ALSO SHOULD FORBEAR FROM SECTION 214 AUTHORIZATION REQUIREMENTS FOR CMRS PROVIDERS THAT RESELL THE LONG DISTANCE SERVICES OF UNAFFILIATED U.S. CARRIERS TO AFFILIATED ROUTES.

CMRS operators that provide international service on an affiliated route[26] solely through the resale of the switched services of an unaffiliated U.S. carrier do not raise anticompetitive

[25] *FCC Launches Inquiry, Proposes Actions to Promote the Deployment of Advanced Telecommunications Services by All Providers*, News Release, Report No. CC 98-24 (Aug. 6, 1998) (Separate Statement of Commissioner Michael K. Powell).

[26] This section specifically deals with affiliations involving foreign wireline carriers. *See supra* note 20. An affiliation is defined to include a greater than 25 percent interest in a foreign carrier or a greater than 25 percent interest by a foreign carrier in a U.S. carrier. *See* 47 C.F.R. § 63.18(h)(1)(i).

concerns. The Commission initially reached this conclusion in its *International Common Carrier Order*[27] wherein it stated:

> We agree . . . that the resale of an unaffiliated U.S. facilities-based carrier's switched services presents no substantial possibility of anticompetitive effects in the U.S. international service market, because the reseller's foreign affiliate is negotiating the terms and conditions of access to the destination market with an unaffiliated carrier on the U.S. end.[28]

This conclusion recently was affirmed in the *Foreign Participation Order.*[29] The agency again concluded that switched resellers serving affiliated markets do not pose the same danger of anticompetitive effects as facilities-based carriers.[30]

The Commission's biggest concern on affiliated routes is that a U.S. carrier and its foreign affiliate could engage in predatory pricing behavior. Such is not the case here. As the Commission correctly determined in the *Foreign Participation Order,* because switched resellers lack control over the underlying facilities, they lack incentive to engage in a predatory price squeeze strategy.[31] Specifically, the agency found that it would 1) "be impossible for a switched reseller to force all facilities-based carriers to cease serving a route permanently";[32] and 2) "be

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27 *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992).

28 *Id.* at 7335.

29 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

30 *Id.* at 23977.

31 *Id.*

32 *Id.* at 23977, 23979. Indeed, the Commission concluded that, even if the switched reseller could drive all other competitors from the market, the underlying facilities-based carrier would have a strong incentive to 1) raise the price of its wholesale service provided to the
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difficult for a switched reseller to impede resell entry."[33] Accordingly, the Commission declined to apply its benchmark condition to switched service resellers serving affiliated markets, concluding that these carriers do not raise sufficient anticompetitive concerns.[34]

CMRS providers reselling switched services of unaffiliated carriers to routes where they are affiliated with wireline foreign carriers are in no position to act anticompetitively. First, they lack control of underlying facilities and, thus, have no ability to force competitors from the market or to prevent subsequent entry. Second, any foreign affiliate would be reluctant to favor its U.S. affiliate over competing providers because it would have to extend favorable treatment to the underlying facilities-based carrier for all its operations — an act highly unlikely to occur. The reality is CMRS providers operating as switched resellers to affiliated routes do not raise any of the anticompetitive concerns expressed by the Commission in the *Forbearance Order* because they would not be negotiating access to the affiliated market with any foreign affiliate. Thus, retention of the Section 214 authorization requirements is unnecessary for CMRS providers under the Section 10 test.

Indeed, as PCIA argued in the previous Section, CMRS providers — affiliated or not — are new entrants in the international marketplace and, therefore, must compete aggressively and

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preying switched reseller, thereby increasing the predator's costs and making recoupment less likely, or 2) break its alliance with the preying switched reseller and benefit from the lack of competition by entering the retail market itself and charging a supra-competitive price. *Id.* at 23979 fn. 404.

33 *Id.* at 23980. Switched resellers unlikely would be able to "command sufficient network capacity to credibly convince potential new entrants that they will be driven from the market by predatory pricing." *Id.*

34 *Id.* at 23978.

pro-competitively to survive and build market share. Competition, which is increasing dramatically in the international marketplace in light of the WTO Agreement, will ensure that CMRS providers' rates and practices are just, reasonable, and not unreasonably discriminatory and that consumers' interests are protected. Moreover, forbearance would further the public interest by removing delays in market entry, reducing administrative burdens, and fostering the immediate introduction of new products and services into the market.

IV. IN THE EVENT THE COMMISSION DETERMINES THAT FORBEARANCE IS NOT APPROPRIATE, IT SHOULD ADOPT A BLANKET SECTION 214 AUTHORIZATION FOR CMRS OPERATORS.

As PCIA has demonstrated above, forbearance clearly is warranted in light of the competitive conditions in the international marketplace for CMRS services. If, however, the Commission denies forbearance, PCIA requests that the agency adopt its streamlining plan to issue a blanket Section 214 authorization[35] for CMRS providers serving unaffiliated markets and CMRS providers reselling the switched services of unaffiliated U.S. carriers to affiliated points.

The tentative conclusions reached by the Commission to justify adoption of a blanket Section 214 authorization for wireline carriers are equally applicable to CMRS operators. PCIA supports the Commission's conclusions that: 1) there are few, if any, grounds upon which to deny or condition a Section 214 authorization to serve an unaffiliated route; 2) the agency's regulatory safeguards are sufficient such that it should never have to deny an application, in the

[35] A blanket authorization eliminates the need for carriers to file a Section 214 application. This authorization, which would be codified in the C.F.R., would certify that it is in the public interest to allow any non-dominant entity to provide facilities-based service, or to resell the international services of other carriers, to any international point except a market where the entity has a foreign affiliate. *See NPRM*, ¶ 8.

first instance, to serve an unaffiliated route; and 3) a blanket authorization would reduce delays in commencing service and processing burdens on its staff.[36]

PCIA reiterates that CMRS operators serving unaffiliated points and CMRS providers reselling long distance services to affiliated points do not pose any anticompetitive threat, thereby justifying forbearance. Nevertheless, to the extent the Commission remains concerned about anticompetitive conduct, a blanket section 214 authorization would leave intact the Commission's ability to condition or revoke an authorization, and, therefore, prevent any potential anticompetitive effects. Thus, at a minimum, a blanket Section 214 authorization is warranted for CMRS operators in the circumstances enumerated above.

V. IF THE AGENCY DETERMINES THAT NEITHER FORBEARANCE NOR A BLANKET AUTHORIZATION IS APPROPRIATE, THE COMMISSION SHOULD, AT A MINIMUM, SHORTEN ITS INITIAL APPLICATION REVIEW PERIOD TO FIVE BUSINESS DAYS AND ITS COMMENT PERIOD TO FIVE DAYS.

If neither forbearance nor a blanket Section 214 authorization is adopted for CMRS operators serving unaffiliated international points, PCIA requests that the Commission shorten the period for placing an application on public notice to five business days and the comment period to five days. Such streamlining would serve dual purposes: 1) continue to permit interested entities the opportunity to comment upon applications, and 2) accelerate the entry of new competitors into the international marketplace. As the Commission has acknowledged, the overwhelming majority of Section 214 applications are granted through a streamlined process.[37]

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36 *NPRM*, ¶¶ 7-8.

37 NPRM ¶ 7.

This means that nearly all Section 214 applications are granted without challenge. As such, it is unnecessary for the Commission to retain a more than 35-day processing timeframe for applications that in practically every instance are granted without contest.[38] A shortened process for reviewing and granting applications will significantly reduce delays in entry into the international marketplace, thereby furthering the public interest through expediting increased levels of competition.

VI. CONCLUSION

In sum, under the statutory standards, the Commission is obligated to forbear from applying Section 214 authorization requirements to CMRS operators providing international services to unaffiliated points. As demonstrated above, competition in the international marketplace will ensure that rates and practices are just, reasonable, and not unreasonably discriminatory and safeguard consumers' interests. Further, forbearance will serve the public interest by eliminating entry delays and reducing administrative burdens.

In addition, forbearance is warranted for CMRS providers reselling the long distance services of unaffiliated U.S. carriers to affiliated points. These providers lack control over underlying facilities and thus cannot engage in anticompetitive behavior.

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[38] Most Section 214 applications requesting authority to resell switched services of unaffiliated U.S. carriers to affiliated routes are granted on a streamlined basis. Further, applications that are contested are granted in practically every instance because the agency concludes that the applicant lacks control of the underlying facilities and thus cannot engage in anticompetitive conduct. *See Bell Atlantic Communications, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Service of Other Common Carriers to Provide Switched Service from the United States to International Points through Resale of International Switched Services*, 11 FCC Rcd 8685, 8699-8700 (1996).

Nevertheless, if forbearance is denied, PCIA supports the Commission's proposal to adopt a blanket Section 214 authorization for CMRS providers. As a last resort, the Commission should shorten its initial application review period to five business days and its comment period for Section 214 applications to five days.

Respectfully submitted,

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August 13, 1998

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on this 13th day of August , 1998, I caused copies of the foregoing "Comments Of The Personal Communications Industry Association On The Notice Of Proposed Rulemaking Regarding International Common Carrier Regulations" to be sent via hand-delivery to the following:

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